Testimony of Curt Hébert, Jr.
Chairman
Federal Energy Regulatory Commission
before the
House Energy and Commerce Subcommittee
on Energy and Air Quality

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Mr. Chairman and Members of the Subcommittee:

My name is Curt Hébert, Jr., and I am Chairman of the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss the Commission's hydropower licensing program.

My testimony today will provide a brief overview of the hydropower licensing program, and some of the challenges it faces. I will then focus on the recommendations for improving the hydroelectric licensing process made by Commission staff in a report submitted to Congress on May 8, 2001, as required by Section 603 of the Energy Act of 2000 (the 603 Report). I fully endorse staff's recommendations.

1. The Commission's Licensing Program

The Commission currently regulates over 1,600 hydropower projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). Non-federal hydropower projects are required to obtain Commission authorization if they are on lands or waters

subject to Congress' authority. Those projects represent more than half of the Nation's approximately 100 gigawatts of hydroelectric capacity and over 5 percent of all electric power generated in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

The Commission's hydropower work generally falls into three categories of activities. First, the Commission licenses and relicenses projects. Relicensing involves projects that originally were licensed 30 to 50 years ago. The Commission's second role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

The Commission is in the second year of a 10-year period (CY2000 to CY2010) during which 218 applications for hydropower relicenses are due to be filed. The Commission has already received 84 of these relicense applications. This group of projects has a combined capacity of approximately 22,000 megawatts (MW), or 20 percent of the Nation's installed hydroelectric capacity. Approximately forty percent of these 218 projects will have filed their relicense applications by the beginning of 2002.

Over the last three decades, the enactment of numerous environmental, land use, and other laws, and new interpretations of certain provisions of the FPA, have significantly affected the Commission's ability to control the timing of licensing and the conditions of a license. Under the standards of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Electric Consumers Protection Act of 1986 (ECPA) amended the FPA to require the Commission to give "equal consideration" to developmental and non-developmental values.

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing power and non-power interests, various statutory requirements give other agencies a powerful role in the licensing process. Among others, those requirements include:

- Section 4(e) of the FPA, which authorizes federal resource agencies such as the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise.

- Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions.

- Section 10(j) of the FPA, which in essence establishes a presumption for inclusion of Federal and State fish and wildlife agencies' recommendations to protect fish and wildlife.

- Section 401 of the Clean Water Act, which authorizes States to impose mandatory conditions as part of the State water quality certification process.

- The Coastal Zone Management Act, which requires that projects affecting coastal resources be consistent with State management programs.

- The Endangered Species Act, which directs the Departments of the Interior and Commerce to propose measures to protect threatened and endangered species.

- The National Historic Preservation Act, which requires Commission consultation with Federal and State authorities to protect historic sites.

There have been three important court decisions concerning the roles of the Commission and the resource agencies under these statutes.

- In PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994) (Jefferson County), the Supreme Court held that a State acting under the CWA could regulate not only water quality (such as the physical and chemical composition of the water), but water quantity (that is, the amount of water released by a project), as well as State-designated water uses (fishing, boating, etc.). It is important to note that the Court specifically acknowledged that its decision did not address the interaction of the CWA and the FPA, since no license had been issued for the project in question. Its decision therefore did not discuss which regulatory scheme would prevail in the event of a direct and critical conflict.

- In American Rivers [I] v. FERC, 129 F.3d 99 (2nd Cir. 1997), the Court held that the Commission lacked authority to determine whether conditions submitted by State agencies pursuant to Section 401 of the Clean Water Act were beyond the scope of that section. The court held that challenges to such conditions were to be resolved instead by the courts.

- Finally, in American Rivers [II] v. FERC, 187 F.3d 1007 (9th Cir 1999), the Court ruled that the Commission lacked authority in individual cases to determine whether prescriptions submitted under color of Section 18 of the FPA were in fact fishways. As in the Second Circuit case, the Court held that challenges to a fishway prescription were to be resolved by the courts, not the Commission. (On December 22, 2000, the Departments of the Interior and Commerce issued a joint Notice of Proposed Interagency Policy on the Prescription of Fishways. The Commission staff filed comments noting that the unilaterally-developed policy would define the term "fishway" in an extremely broad manner that in staff's view is inconsistent with the definition of that term enacted by Congress in the Energy Policy Act of 1992).

As a result of these judicial rulings, if the Commission were to conclude that one or more mandatory conditions would render a project inconsistent with the public interest, its only recourse would be to deny the license application. Not only is this a blunt instrument, but in most relicense proceedings denial is not a viable alternative.

2. The Commission's Licensing Process

The Commission currently uses two different processes in licensing: the "traditional" process and the "alternative" process. Under the alternative process, pre-filing consultation and environmental review can be integrated and proceed concurrently, in a collaborative manner, thereby dramatically shortening the processing time for an application.

Although the Commission staff invests substantial time and effort on alternative licensing processes during the pre-filing stage, it is clear that the effort produces savings in processing time and efficiency once applications are filed with the Commission. After an application is filed, the median time for the Commission to process the application and issue a new license order is about 16 months. An example is the Upper Menominee River Basin Projects, eight existing hydroelectric developments located in Michigan and Wisconsin. New license were issued January 12, 2001, about 15 months after the applications were filed.

Based on discussions Commission staff has had with the industry, we expect that about one-third of the next wave of relicense applicants will pursue the alternative process route.

The Commission has worked to improve the licensing process by making its regulations more clear and specific, enhancing opportunities for stakeholder participation, and providing flexibility to license applicants and others to design collaborative efforts that meet the needs of all participants. In addition, Commission staff routinely holds "outreach" meetings throughout the country to inform all stakeholders about the licensing process, and has taken an active role in facilitating settlements and introducing alternative dispute resolution procedures. The staff has also participated in Interagency training on hydropower licensing, and in the Electric Power Research Institute's National Review Group, which shares "lessons learned" in the hydropower licensing process. The details of these efforts are described in Commission staff's 603 Report.

3. Costs and Times for Obtaining a License

The following discussion is based on information contained in the 603 Report. The staff found that, using the traditional process, it takes about 32 months in pre-filing consultation and study in addition to 47 months in post-filing processing to license a project. In the alternative licensing process, prefiling consultation and study is more intense and takes about 40 months, but the post-filing process takes only about 16 months. Thus, on average the total time spent on an application is 23 months shorter with the alternative licensing process than with the traditional process.

For the traditional process, the average cost of application preparation is $109/kW, and the cost for protection, mitigation, and enhancement measures is $264/kW. In contrast, for the alternative licensing process, the average costs for application preparation and protection, mitigation and enhancement measures are $39/kW and $58/kW, respectively -- substantially lower than for the traditional process.

4. Recommendations to Reduce the Cost and Time of Licensing

My colleagues and I are aware of the need to complete the relicensing process as expeditiously as possible while also protecting the environment. Many have said that the licensing process takes too long and costs too much. Much of time and resources spent are unavoidable. But the recent energy shortfalls in the West and especially in California, have given more impetus to the need not just to pursue marginal efficiencies but for a fundamental restructuring of the licensing process.

The 603 Report identified the primary sources of cost and delay in the licensing process and proposed time-saving changes to certain Commission policies and procedures, but also identified, as Congress requested, legislative changes needed to effectuate any significant reduction in the time and cost of relicensing.

In the 603 Report, the staff made the following recommendations, which I endorse:

A. LEGISLATIVE RECOMMENDATIONS

1. Establish one-stop shopping at the Commission for all federal authorizations.

Federal agencies with mandatory conditioning authority would retain that authority, subject to a statutory reservation of Commission authority to reject or modify the conditions based on inconsistency with the Commission's overall public interest determination.

The license would also be the only federal authorization required to operate the project, e.g., special use authorizations for projects on Forest Service lands and similar authorizations would be eliminated. A single administrative process would be established by the Commission to address all Federal agency issues in a licensing case, with schedules and deadlines established by the Commission, and with one administrative record compiled by the Commission in consultation with the other Federal agencies. The Commission would prepare a single NEPA document. The Federal agencies would not be required to adopt the Commission's conclusions, but would have to provide for the record their own analysis and conclusions based on the evidentiary record. The agencies'

analyses and conclusions would be included in the record of the Commission's order acting on the application, and judicial review would be obtained by seeking rehearing of the Commission's order.

If this recommendation is not enacted, then the following recommendation might reduce some of the high costs resulting from mandatory conditions:

2. Require agencies to better support their conditions (alternative to A.1).

If the Commission is not given authority to balance all the developmental and environmental values and make a decision in the public interest, and, if agencies with conditioning authority conduct separate proceedings, an alternative would be to require resource agencies to consider the full panoply of public interest values, support their conditions on the record, and provide a clear administrative appeal process.

Supporting Findings for A1. And A.2

The 603 Report showed that the costs for protection, mitigation, and enhancement measures for traditional licenses containing Section 4(e) and 18 mandatory conditions ($590/kW) were 2.7 times the cost for licenses not containing those conditions ($218/kW). The Commission staff does not routinely highlight disagreements with mandatory conditions; however, in the 12 percent of cases where staff did so, staff found that those conditions were substantially more expensive than conditions that staff thought adequate to protect environmental resources. Alternative Recommendation A.2. might reduce the cost of some mandatory conditions.

3. Focus Clean Water Act authority.

At least for hydropower projects, limit water quality certification to physical and chemical water quality parameters.

Supporting Findings

Water quality certification requirements can be costly and the time to obtain certification is a substantial source of delay. There has clearly been an increase in the number and variety of certification conditions since the Jefferson County and American

Rivers I decisions. For comparison, staff reviewed licenses issued in 1992, before these decisions were issued, and in 1999, two years after American Rivers.

Staff reviewed the number and kinds of water quality certification conditions in each license. These were categorized as pertaining to the physical characteristics of the water (temperature, dissolved oxygen, clarity, etc.), designated uses of the water body (e.g., fishing or swimming, and therefore fish passage and instream flows), or administrative (state approvals, reopener clauses, etc.). The 603 Report documented a substantial increase in the number of certification conditions and a more than doubling of the number of conditions related to designated uses. Of equal concern, of 129 currently pending licensing cases, 52 (25 percent) are currently held up by certification issues. Clearly, water quality certification is a substantial source of cost and delay.

4. Provide a statutory definition of fishway.

Supporting Findings

Since the American Rivers II case (1999), the Commission lacks authority to decide if a prescription is a "fishway." If the Commission concludes that a fishway prescription is drafted so broadly as to render the project inconsistent with the public interest, its only recourse is to deny the license.

5. Remit annual charges for other federal agency FPA Part I costs directly to agencies, specifying that it is to be used for implementing Part I.

Supporting Findings

Numerous agency, tribe, and non-governmental organizations supported amending the FPA to permit the Commission to remit directly to other Federal agencies with FPA Part I responsibilities the portion of administrative annual charges attributable to their costs, and to specify that such remittances be used for FPA Part I purposes. By ensuring that Federal agencies recover appropriated funds spent for the licensing process, such legislation would support the federal agencies' participation in that process.

B. REGULATORY AND POLICY CHANGES

1. Require license applicants to submit during prefiling consultation a status report focusing on study requests, to enable Staff to determine if pre-filing involvement is warranted.

Supporting Findings

The median time from filing to issuance of the notice that a license application is ready for environmental assessment is 17.4 months for the traditional process, and only 2.1 months for the alternative licensing process. The difference can be attributed to the high number of additional study requests under the traditional process. Resolving study disputes pre-filing would save about 15.3 months in total processing time. About 25 percent of application preparation costs are incurred post-filing. These costs largely involve study needs that were not resolved pre-filing.

2. Agencies would be allowed to revise their recommendations and conditions only with the agreement of the Commission, and in a reasonable period after the first (or only) environmental document. Eliminate the option for Federal agencies to file by the deadline only preliminary terms and conditions and a schedule for filing final conditions.

Supporting Findings

In many of the cases pending over five years as of 1997, delays in processing are caused by agencies filing their 10(j), Section 18, and 4(e) conditions filed late in the process (average one to six months delay on initial conditions, and up to 17 months for final conditions).

3. Applicants would be required to conduct pre-filing consultation with the public and non-governmental organizations. Currently, applicants are required to consult only with agencies and tribes.

Supporting Findings

Staff expects that greater involvement of interested entities up-front would result in fewer delays from new issues, and resultant new study requests.

4. Allow applicants to maintain public information electronically rather than in hard copy.

Supporting Findings

The Commission's rules currently require applicants for new licenses to maintain on file and available for public inspection certain data regarding the existing project facilities and operation. Licensees, who maintain that little use is made of physical libraries, propose instead that the Commission give them the option to put the data on a web site, with hard copy on request at no cost.

5. Continue to promote alternative licensing processes and settlements, through more staff outreach and involvement.

Supporting Findings

The alternative licensing process results in a median process time that is 23 months less than traditional license process times. Average costs of application preparation and protection, mitigation and enhancement measures are significantly less for the alternative licensing process as compared to the traditional license process. Substantially more settlements and substantially less rehearings result from the alternative licensing process as compared to the traditional license process.

6. Issue a draft Environmental Assessment (EA) before preparing the final EA only if necessary. Comments on the final EA would be handled in the merits order. Staff would retain discretion to do a draft or supplemental EA.

Supporting Findings

Staff conservatively estimated that about one-third of the average time between the Draft EA and the Final EA - - that is, about two months -- would be saved if no Draft EA were prepared, and that the Commission would save about $24,000 for the traditional licensing process and $8,000 for the alternative licensing process.

7. Issue a single NEPA scoping document, and instead would accommodate any comments on the scoping document in its preparation of the NEPA document.

Supporting Findings

Staff conservatively estimated that about one-third of the time for preparing a second NEPA scoping document -- that is, about two months -- would be saved, and that the Commission would save about $7,500.

8. Increase the standard new license term to 50 years, absent compelling reasons to do otherwise. This is consistent with the "living license" approach and expanded use of the Commission's reserved authority to amend the license to address new issues.

Summary Findings

A relatively high portion of licensing costs, $85/kW, is for application preparation costs, as compared to $212 for protection, mitigation, and enhancement measures. For small projects, application costs are about half of total licensing costs. This proposal would reduce licensee costs by decreasing the frequency of the application preparation costs and by providing more time to amortize the costs of protection, mitigation, and enhancement measures.

5. Conclusion

The Commission is well aware of the importance of hydropower, and of the significant role we play in licensing and overseeing crucial hydropower projects. We also recognize that the hydropower licensing process is often too long and too costly. The Commission and its staff will do everything we can to improve that process. At the same time, we are prepared to work with Congress and other agencies to craft legislative solutions. Together, we can develop the efficient, comprehensive licensing process that our Nation's energy needs demand.

Thank you. I will be pleased to answer any questions you may have.